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No. 03-73

IN THE

Supreme Court of the United States

DONALD H. CARLSON, WARREN HART, GERARD HASKINS, STEPHEN R. LIBBY, EARL WEESE, AND LYLA C. WEESE, INDIVIDUALLY AND AS A CLASS REPRESENTATIVES OF BEHALF OF ALL PERSONS SIMILARLY SITUATED,

Petitioners,

v.

STATE OF ALASKA, COMMERCIAL FISHERIES ENTRY COMMISSION,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Alaska

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND A BRIEF OF THE TANGIER SOUND WATERMAN'S ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION

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The Tangier Sound Waterman's Association (the "Association"), as *amicus curiae*, hereby respectfully requests leave to file the attached brief in support of the Petition for Certiorari.

The Association is an unincorporated group of approximately 80 commercial fishermen who live in

Maryland. The Association's members must pay a nonresident fee in order to fish in Virginia and thus they have been victims of the discriminatory burdens imposed by nonresident fishing fees, such as those in this case. In addition, the Association has long been concerned that states do not impede, through discriminatory regulations, the fundamental rights of fishermen to engage in their livelihood. The interest of the Association as *amicus curiae* is described in greater detail *infra* at Brief. pp. 2-3.

The Association requests that this Court grant this motion for two primary reasons. First, the Association believes that its discussion of the issues will benefit the Court. The Association has participated in two cases involving discrimination against nonresident commercial fishermen. *See Tangier Sound Waterman's Ass'n v. Pruitt*, 4 F.3d 264 (4th Cir. 1993); *Tangier Sound Watermen's Ass'n. v. Douglas*, 541 F. Supp. 1287 (E.D. Va. 1982).

Second, members of the Association have a strong interest in these issues and wish to address the implications of this case for fishermen across the country. Unconstitutional nonresident fishing fees are widespread and often prohibitively high. Unfortunately, fishermen often lack the financial resources necessary to pay or challenge nonresident fees. Because of its experience in this area, the Association would like to comment on these issues for the benefit of the Court.

Wherefore, the Association respectfully requests that this Court grant its Motion for Leave to file the attached *amicus curiae* brief.

Respectfully submitted,

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BRIEF OF THE TANGIER SOUND WATERMAN'S ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION

INTRODUCTORY STATEMENT

This brief is submitted by The Tangier Sound Waterman's Association as *amicus curiae* in support of the Petition for a Writ of Certiorari.

INTEREST OF *AMICUS CURIAE*[1]

The Tangier Sound Waterman's Association (the "Association") is an unincorporated association of approximately 80 commercial fishermen residing in Maryland in communities on Smith Island and in the vicinity of Crisfield, Maryland, on the Eastern Shore of the Chesapeake Bay. Smith Island is located at approximately the center of the Chesapeake Bay and is transected at its southernmost tip by the boundary between Maryland and Virginia. The Association's members harvest the many species of edible fish, crabs, and shellfish in the waters of the Chesapeake Bay and its tributaries.

The Association has long been concerned with discrimination against nonresident commercial fishermen. Prior to 1982, Virginia prohibited all nonresidents from commercial fishing within Virginia's territorial waters. In *Tangier Sound Watermen's Ass'n v. Douglas*, 541 F. Supp. 1287 (E.D. Va. 1982) ("*Tangier I*"), the District Court for the Eastern District of Virginia held that Virginia's prohibition on all nonresident fishing was unconstitutional. In 1983, in reaction to the decision, the Virginia legislature imposed a fee of $350 upon nonresidents engaging in commercial fishing within the Commonwealth of Virginia.

In 1991, Virginia tripled its nonresident commercial fishing fee to $1,150 per boat. Va. Code § 28.1-47.1 (1991) (repealed 1992). The Association successfully challenged this fee as violating the Privileges and Immunities Clause of the United States Constitution. *Tangier Sound Waterman's Ass'n v. Pruitt*, 4 F.3d 264 (4th Cir. 1993) ("*Tangier II*"). After the decision in *Tangier II*, Virginia's General Assembly passed another statute authorizing the Virginia Marine

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[1] No counsel for a party in this case authored this brief in whole or in part and no person or entity, other than *amicus* or its counsel, made a monetary contribution to this brief's preparation or submission.

Resources Commission (the "Commission") to establish a fee "no less than $350 or more than $1,150." Va. Code § 28.2-227 (2003). Since 1993, the Commission has charged a $350 nonresident fee. Like the prior $350 nonresident fee, the fishermen have not challenged the present fee of $350 because it is economically prohibitive for them to do so.

Many of the Association's members harvest fish in Virginia but reside in Maryland near the Virginia boundary, and thus have a particular interest in nonresident fishing fees. In addition, the Association is concerned that states do not impede, through nonresident fees, the fundamental rights of fishermen to engage in their livelihood without suffering the burden of unreasonable and discriminatory regulations. If not reviewed by this Court, the decision in this case will encourage other states to discriminate against nonresidents by enacting or increasing nonresident fishing fees in disregard of the Privileges and Immunities and Commerce Clauses of the United States Constitution.

STATEMENT

This case involves Privileges and Immunities Clause and Commerce Clause challenges to Alaska's nonresident commercial fishing fees. Given the tendency of states to favor their own residents over nonresidents who cannot vote, parochial and discriminatory nonresident fees are a common burden and often a total barrier for commercial fishermen. Nonresident fees such as those imposed in this case are unconstitutional under both the Privileges and Immunities Clause and the Commerce Clause.

ARGUMENT

I.

THERE ARE COMPELLING REASONS FOR GRANTING THE WRIT

The questions raised by Petitioners in this case merit this Court's review. States have a tendency and incentive to favor their own citizenry and industry over those of other states.[2] The desire to prevent states from taxing each other was one of the driving forces behind the Constitution. Repeatedly in The Federalist Papers, the founders argued in favor of the Commerce and Privileges and Immunities

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[2] The assessment of unconstitutional fees on nonresidents for the privilege of conducting business in a given locality is not limited to the commercial fishing industry. In *Homier Distrib. Co., Inc. v. City of New Bedford*, the court held that a city ordinance requiring non-domestic transient vendors to obtain a $2,000 license to conduct business in the city violated the Commerce Clause. 188 F. Supp.2d 33, 36 (D. Mass. 2002). The court held that the ordinance violated the Commerce Clause, which "prohibits 'state or municipal laws whose object is local economic protectionism.'" *Id.* (quoting *C&A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 390 (1994)). In *City of New York v. New York*, the court held that, where no tax was imposed on commuters working in New York City and living in the State of New York, the assessment of commuter taxes on individuals working in New York City while living outside the State violated the Privileges and Immunities Clause as well as the Commerce Clause. 94 N.Y.2d 577, 587 (N.Y. App. 2000). The court noted that the statute "intentionally create[d] inequality between resident and nonresident commuters [and thus violated the] Privileges and Immunities Clause [which] plainly and unmistakably secures and protects the right of the citizens of one State to be exempt from any higher taxes or excises than those imposed by another State upon its own citizens." *Id.* at 595-96. The court held that the statute also violated the Commerce Clause and noted that the "tax clearly is assessed against the interstate labor market per se . . . and favors intrastate economic activity over interstate activity by taxing only out-of-State workers." *Id.* at 598. This Court should grant the Petition in order to review the constitutionality of such fees before other cities and states impose similar fees.

Clauses to limit the "unbridled spirit [in] regulations of trade, by which particular States might endeavor to secure exclusive benefits to their own citizens" and "the desire of the commercial States to collect, in any form, an indirect revenue from their uncommercial neighbors." The Federalist No 7, at 30 (Alexander Hamilton) and No 42, at 214 (James Madison) (G. Wills ed., 1982).

Despite the Privileges and Immunities Clause, the Commerce Clause, and the body of caselaw finding that there is no substantial reason for discriminating against nonresidents trying to earn a living in commercial fisheries, states continue to maintain discriminatory commercial fishing fees based upon state residency. For example, despite this Court's decision in *Mullaney v. Anderson*, 342 U.S. 415 (1952), Alaska has continued to levy higher fees on nonresident commercial fishermen. After the court struck down Virginia's absolute prohibition on nonresident fishermen in *Tangier I*, 541 F. Supp. 1287 (E.D. Va. 1982), Virginia immediately implemented a nonresident fee of $350. When that fee did not keep out nonresidents, Virginia tripled the fee to $1,150. After the Fourth Circuit held that Virginia's $1,150 fee violated the Privileges and Immunities Clause in *Tangier II*, 4 F.3d 264 (4th Cir. 1993), Virginia authorized yet another nonresident fee. *See* Va. Code § 28.2-227. At least thirty-four other states discriminate against commercial fishermen by imposing nonresident fees. *See* Petition at n.8.

This unconstitutional discrimination is pervasive because there are real and significant impediments to challenging nonresident fees. Commercial fishermen usually operate independently and tend to be loosely organized, if at all. Even when fishermen are organized, they often lack the financial resources necessary to mount a legal challenge against a state. Moreover, nonresident fishermen are helpless to challenge the laws through the political process in

states where they do not reside. As a result, commercial fishermen across the country continue to pay unconstitutional fees or are precluded from participating in a state's fishing industry. Given these national implications, the Petition should be granted.

II.

THE DECISION OF THE SUPREME COURT OF ALASKA DIRECTLY CONFLICTS WITH DECISIONS OF THIS COURT

The decision of the Supreme Court of Alaska conflicts with previous Privileges and Immunities and Commerce Clause holdings of this Court.

A. The Decision Below Conflicts With Privileges And Immunities Clause Decisions Of This Court

In contrast to the holding of the Supreme Court of Alaska, this Court and other courts have consistently held that nonresident fishing fees violate the Privileges and Immunities Clause.[3] As recognized by the Supreme Court of Alaska, the statute under review is subject to an inquiry under the Privileges and Immunities Clause because

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[3] The leading case is *Toomer v. Witsell*, 334 U.S. 385, 399 (1948), in which this Court held that South Carolina's $2,500 fee for nonresident shrimp fishermen violated the Privileges and Immunities Clause. This Court again addressed the issue of nonresident fishing fees in *Mullaney v. Anderson*, 342 U.S. 415 (1952). In *Mullaney*, the then territory of Alaska imposed a $5 license fee on resident fishermen and a $50 fee on nonresidents. 342 U.S. at 416. This Court held that Alaska's discriminatory fees violated the Privileges and Immunities Clause. Other cases invalidating nonresident commercial fishing fees include *Tangier II*, 4 F.3d 254 (4th Cir. 1993) (Virginia's $1,150 nonresident fee violated privileges and Immunities Clause) and *Gospodonovich v. Clements*, 108 F. Supp. 234 (E.D. La. 1951) (nonresident fishing fees in Louisiana held invalid under Privileges and Immunities Clause).

"[c]ommercial fishing is a sufficiently important activity to come within the purview of the Privileges and Immunities Clause." *Carlson v. Alaska*, 798 P.2d 1269, 1274 (Al. 1990). Alaska discriminates against nonresident fishermen and denies them a privilege and immunity of citizenship by charging them more for a fishing license than it charges residents. *See Hicklin v. Orbeck*, 437 U.S. 518, 525 (1978) ("'[A] resident of one State is constitutionally entitled to travel to another State for purposes of employment free from discriminatory restrictions in favor of state residents imposed by the other State.'") (quoting *Ward v. Maryland*, 79 U.S. 418 (1870)).

Although this Court has noted that discrimination can be upheld if "(i) there is a substantial reason for the difference in treatment; and (ii) the discrimination against nonresidents bears a substantial relationship to the State's objective," the fee differential at issue in this case is not justified because it is not closely related to a "substantial reason" for the discrimination. *See Supreme Court of New Hampshire v. Piper*, 470 U.S. 274, 284 (1985). In order to justify a discriminatory license, "nonresidents must somehow be shown to 'constitute a peculiar source of the evil at which the statute is aimed.'" *United Bldg. and Const. Trades Council v. Mayor and Council of Camden*, 465 U.S. 208, 222 (1984) (quoting *Toomer v. Witsell*, 334 U.S. 385, 398 (1948)). In the lower court's decision, the Supreme Court of Alaska did not identify a peculiar source of evil posed by nonresident fishermen to the state's fisheries.

Even if the Court determines that there was a "substantial reason" for the discrimination, the Court should still find the statute to be unconstitutional because the discrimination does not bear a substantial relationship to any objective of the state. *See Piper*, 470 U.S. at 284. Petitioner has argued persuasively that jurisprudence from the negative Commerce Clause cases should be used to analyze the

relationship between the fee differential and the State's objective, as this Court has noted that the Privileges and Immunities Clause and the Commerce Clause have a "mutually reinforcing relationship." *Hicklin*, 437 U.S. at 248. Based on this Court's negative Commerce Clause jurisprudence discussed below, the higher license charged to nonresident fishermen should fail because Alaska has not identified a charge imposed on resident fishermen for which the surcharge is meant to compensate. *See Tangier II*, 4 F.3d 264, 268 (4th Cir. 1993) (holding that Virginia statute in which nonresident harvester's license fee was derived by dividing the amount that the state spent on all fishermen, commercial and recreational, by the number of resident commercial fishermen was unconstitutional because "nonresident fishermen [were] being charged unfairly for programs funded by all taxpayers to benefit all fishermen, whether commercial or sport fishermen").

B. The Decision Below Conflicts With Negative Commerce Clause Decisions Of This Court

In addition to violating the Privileges and Immunities Clause, the imposition of higher license fees for nonresident fishermen violates the negative Commerce Clause based on previous decisions of this Court. Contrary to the holding of the Supreme Court of Alaska in this case, the imposition of different fees based on the residency of the applicant is subject to review under the negative Commerce Clause as "the transportation of persons across state lines . . . has long been recognized as a form of 'commerce.'" *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 573 (1997). The surcharge imposed on nonresident commercial fishermen creates protectionist barriers to interstate commerce and thus is beyond the scope of permissible state regulation under the Commerce Clause. *See City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978) (striking down New Jersey statute that prevented the

importation of waste from outside the state); *Oregon Waste Sys., Inc. v. Department of Envtl. Quality of Oregon*, 511 U.S. 93 (1994) (declaring unconstitutional a state law that charged more for disposal of out-of-state waste than for disposal of waste generated in-state).

In assessing a higher fee for nonresident fishing licenses than for comparable resident licenses, Alaska has enacted a surcharge on nonresident fishermen that resembles a compensatory tax. This Court has recognized that states may require "'those engaged in interstate commerce [to pay] their just share of state tax burden[s]'" through the imposition of compensatory taxes. *Oregon Waste*, 511 U.S. at 102 (quoting *Western Live Stock v. Bureau of Revenue*, 303 U.S. 250, 254 (1938)). Alaska contends that the surcharge on nonresident fishing licenses compensates the State for the funds contributed by resident fishermen for the maintenance of the State's fisheries. As noted by the Supreme Court of Alaska, "oil revenues spent on conservation could have been used to benefit residents through various other programs and they are, analytically, equivalent to taxes which only residents pay." *Alaska Commercial Fisheries Entry Comm'n v. Carlson*, 65 P.3d 851, 855 (Al. 2003) (internal quotation marks omitted).

Although this Court has recognized that "interstate commerce may be made to 'pay its way,'" the fee differential is unconstitutional because the State has not satisfied the three requirements for a valid compensatory tax. *Oregon Waste*, 511 U.S. at 102 (quoting *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 281 (1977)). A state imposing a compensatory tax must first

> identif[y] . . . the [intrastate burden] for which the State is attempting to compensate. . . . Once that burden has been identified, the tax on interstate commerce must be shown

> roughly to approximate – but not exceed – the amount of the tax on intrastate commerce. . . . Finally, the events on which the interstate and intrastate tax are imposed must be substantially equivalent; that is, they must be sufficiently similar in substance to serve as mutually exclusive prox[ies] for each other.

Id. at 103 (internal quotation marks omitted).

As in *Oregon Waste*, in which this Court invalidated Oregon's statute that charged more for the disposal of waste transported from outside of Oregon than for the disposal of waste generated in the State, the Alaska license fee for nonresident fishermen is unconstitutional because it does not qualify as a valid compensatory tax. *Id.* First, Alaska has not identified a valid intrastate tax burden for which the State is attempting to compensate. Alaska employs a complicated formula in an effort to calculate the funds that resident fishermen allegedly contribute to the maintenance of the State's fisheries. In so doing, the State analogizes the per capita portion of oil revenue that is used to maintain the fisheries to a state tax paid by residents and suggests that the fee differential is designed to compensate for this "tax" burden. This Court, however, has recognized the "danger of treating general revenue measures as a relevant intrastate burden for purposes of the compensatory tax doctrine," *Fulton Corp. v. Faulkner*, 516 U.S. 325, 335 (1996), and has repeatedly declined to open a loophole in the compensatory tax jurisprudence that "'would allow a state to tax interstate commerce more heavily than in-state commerce anytime the entities involved in interstate commerce happened to use facilities supported by general state tax funds.'" *Oregon Waste*, 511 U.S. at 105 (quoting *Government Suppliers Consolidating Servs., Inc. v. Bayh*, 975 F.2d 1267, 1284 (7th Cir. 1992)). This Court, accordingly, should hold the nonresident license fee to be unconstitutional and decline to

justify the surcharge as compensation for an intrastate burden calculated as a portion of the State's general oil revenues.

Second, the "tax" on interstate commerce does not roughly approximate the amount of the "tax" on intrastate commerce. In *Oregon Waste*, this Court found that the Oregon surcharge of $2.25 on waste transported from out-of-state was not a compensatory tax because Oregon did not "impose a specific charge of at least $2.25 per ton on shippers of waste generated in Oregon, for which the out-of-state surcharge might be considered compensatory." 511 U.S. at 104. Similarly, the formula employed by the State to calculate the surcharge on nonresident fishing licenses does not accurately calculate a burden on intrastate commerce because the formula theoretically calculates the burden borne by all Alaska residents rather than the burden borne by resident commercial fishermen.

Third, the events on which the interstate and intrastate fees are imposed are not "substantially equivalent" because they are not sufficiently similar to serve as mutually exclusive proxies for each other. *Id.* at 103. In order for the fees to satisfy this third requirement, they must be imposed on comparable taxable events. Unlike "[t]he prototypical example of substantially equivalent taxable event [which] is the sale and use of articles of trade," the State compares dissimilar events in calculating the license fee for nonresident fishermen. *Id.* at 105. Alaska compares the license fee imposed on nonresident fishermen to the fee imposed on resident fishermen *plus* an allocation of oil revenue. Because Alaska compares dissimilar events that are not "mutually exclusive" proxies for each other, the surcharge is unconstitutional. *Id.* at 103.

Because the Alaska surcharge on nonresident fishing licenses does not satisfy the requirements of a valid

compensatory tax, this Court's decisions dictate that the surcharge is unconstitutional as violative of the negative Commerce Clause.

CONCLUSION

For the reasons set forth above, the Tangier Sound Waterman's Association respectfully requests that the Court grant the Petition and reverse the decision of the Supreme Court of Alaska.

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